

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 27, 2007 Session

STATE OF TENNESSEE v. RHEUBIN M. TAYLOR, II

**Direct Appeal from the Criminal Court for Hamilton County
No. 252134 Buddy D. Perry, Judge**

No. E2006-01785-CCA-R3-CD - Filed June 26, 2008

The defendant, Rheubin M. Taylor II, was convicted of voluntary manslaughter, felony reckless endangerment, attempted voluntary manslaughter, and reckless aggravated assault which the trial court merged with the attempted voluntary manslaughter conviction. The trial court sentenced the defendant as a Range I, standard offender to four years, suspended to supervised probation with twelve months to be served on house arrest. At the hearing on the defendant's motion for a new trial, the trial court granted judicial diversion to the defendant. The State appeals, arguing that the trial court's grants of judicial diversion and probation are not supported by the record and should be reversed. The defendant argues that the trial court's sentencing determinations should be upheld and that the trial court erred in applying one sentencing enhancement factor. We conclude that, in granting judicial diversion, the trial court did not make sufficient findings to permit appellate review. Accordingly, we reverse the order of the trial court and remand for resentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steve Strain, Assistant District Attorney General, for the appellant, State of Tennessee.

B. Stewart Jenkins and Daniel K. Habenicht, Chattanooga, Tennessee, for the appellee, Rheubin M. Taylor, II.

OPINION

FACTS

State's Proof

On the night of June 9, 2003, a large crowd had gathered in downtown Chattanooga for a festival known as the Bessie Smith Strut (“Strut”).¹ At around 10:00 p.m., Officer Peter Turk of the Chattanooga Police Department was dispatched to the intersection of 10th and Foster Streets, one block from Martin Luther King Boulevard, where the Strut had taken place. When he arrived, Officer Turk found the victims, Tory Hardy and Ronald Harris, lying in the street. Hardy was unconscious and had blood on his face, neck, and chest. Harris appeared to have a gunshot wound to his chest but was conscious.

Terilyne Nicholson testified that her son, Tory Hardy, was killed at the Strut in June 2003. She said Hardy had been working at Erlanger Hospital at the time of his death and had a young son.

Domanique Webb testified that his nickname was “D-Low” and that he knew the victims and Tim Beasley. After the Strut, Webb, Hardy, and Beasley were walking together on 10th Street on their way to a party when they encountered the defendant who was driving a white Chevrolet with a maroon top. Webb testified that as he was crossing 10th Street, the defendant sped up and he had to jump out of the way. He cursed at the defendant, who responded by extending his middle finger. He testified that the defendant drove a bit further, then stopped because of heavy traffic, and a crowd gathered around the defendant’s car. The defendant brandished a gun, and the crowd backed away. Webb heard someone in the crowd say, “Let me see the strap”² and witnessed the defendant shoot over his left shoulder into the crowd. Webb testified that he never saw Tim Beasley with a gun. After the shooting began, Webb ran from the scene but later returned to find Harris bleeding and lying on the ground.

On cross-examination, Webb testified that the group he was with had planned to fight another group of young men shortly before the shooting. He denied that his group was a gang, although he acknowledged that many in his group were dressed similarly that evening. He testified that the other group was dressed in red and known as the Bloods. Police officers separated the two groups before any fighting took place. Webb testified that after the defendant approached him on 10th Street, several people began threatening the defendant and using the “N” word toward him. Webb denied that he had drunk alcohol or smoked marijuana that night but acknowledged that some in his group had smoked marijuana. He said that when the defendant stopped his car, some of his group ran toward the car and threatened to pull the defendant out and “kick [his] ass.” Webb denied seeing anyone reach into the defendant’s car and said that everyone in the crowd remained on the sidewalk. He said that after the shooting started, he saw Beasley, Hardy, and Harris run away from the car.

Ronald Harris testified that, after the Strut ended, he was walking home with his friends when the defendant nearly hit Webb. He was a part of the crowd that approached the defendant’s car when it stopped. The defendant displayed a pistol, and the crowd backed away. Harris began running

¹ Because the defendant does not challenge the sufficiency of the convicting evidence, we summarize the most pertinent proof elicited at trial, omitting entirely the testimony of several witnesses.

² Webb explained that in this context “strap” is slang for “gun.”

when he heard gunshots but could not tell from where the first shots came. While running down Foster Street, Harris collapsed because he had been shot. He initially did not realize that he had been shot and did not see who shot him. He testified that a bullet entered the right side of his chest and exited his lower back on the same side. Harris testified that he saw Douglas Holmes on the night of the shooting and knew that Holmes had a gun that night. He said that Tim Beasley shot at the defendant's car but did not know how Beasley had acquired a gun. He did not see the defendant fire at Beasley because he had started running by that point. Harris testified that he never got close to the defendant's car and did not say anything to the defendant.

On cross-examination, Harris acknowledged that some of his group had been drinking beer and some, including himself, had been smoking marijuana. He said that he knew that the defendant was in trouble and that if the crowd had gotten him out of the car they probably would have assaulted him. He acknowledged that the defendant did not fire his weapon until after shots had been fired at him. He identified photographs of the defendant's car depicting bullet holes in close proximity to the driver's seat.

Victor Freeman testified that he met Hardy, Beasley, and Holmes on his way home from the Strut. His testimony was consistent with that of Webb and Harris regarding the beginning of the incident between the defendant and Webb. He said he approached the defendant's car when it was stopped in traffic and retreated to the sidewalk when he saw the defendant brandish his gun. He saw Beasley standing to his right, with Hardy behind Beasley. He never saw Beasley with a gun but remembered seeing the defendant fire the first shot. As the shooting began, Freeman fled the scene but later returned to find Hardy and Harris lying in the street. He testified that he later realized he had been shot in the lower right leg. However, when he arrived at the hospital, he told medical personnel that he had cut his leg because he did not want to be involved in the shooting incident.

On cross-examination, Freeman testified that he did not see the defendant pull the trigger to shoot him, although he saw him aim the gun in his direction. He acknowledged kicking through a glass door later in the evening, before he went to the hospital, but denied that the cut on his leg came from kicking the door. He said that he did not see Beasley with a gun that night but that Beasley was known to carry a gun.

Michael Little, a member of the crowd, testified that he realized the driver of the Chevrolet had a gun when he heard someone yell, "He got a gun." He did not see anyone in the crowd with a gun and said the first shots came from the car. He felt "fragments" hit him and began to run. He saw Hardy fall and stayed with him until the ambulance arrived.

Douglas Holmes testified that he brought a .38 revolver to the Strut, and saw Hardy, Beasley, and Harris there. After the Strut ended, he walked amongst the crowd carrying the pistol stuffed in his pants. He witnessed the incident between Webb and the defendant and was part of the crowd that later surrounded the defendant's car. Holmes said that he saw the defendant display his gun outside his window and the crowd move away from the car. Beasley then approached him and asked if he had a "strap." Holmes testified that as Beasley was retrieving the gun, the defendant fired a shot, and

Beasley then returned fire. Holmes heard eight to nine shots as he ran behind a building. He said he later reacquired the revolver but could not recall who returned it to him. A few days later, he sold the gun but could not recall to whom he sold it.

On cross-examination, Holmes acknowledged that in his first statement to the police he denied both carrying a gun that night and knowing who in the crowd had a gun. He said he had consumed alcohol and drugs the night of the Strut and was “pretty messed up.” He agreed that he testified at the preliminary hearing that he did not remember much about the incident but said he did so because he did not want to be involved. He said he did not know who shot the victims.

Australia Dunagan testified that he purchased a pistol from Douglas Holmes after the Strut. He said his aunt would not allow him to keep it in her house, so he gave the gun to a friend, Jamal Mays, to keep.

Officer Chris Beavers of the Chattanooga Police Department testified that he was dispatched to the defendant’s residence on the night of the shooting and recovered a .357 magnum handgun. The defendant told Officer Beavers that someone shot at him as he was leaving the Strut and that he returned fire.

Dr. Frank King, the Hamilton County medical examiner, testified that Tory Hardy’s cause of death was a gunshot wound to the left chest which perforated the heart and right lung. He said that Hardy’s blood alcohol level was .12%.

Dr. Donald Barker testified that he provided medical treatment to Ronald Harris at Erlanger Hospital. He said that Harris had a gunshot wound to the right chest and that the bullet had exited posteriorly at the tip of the scapula. He said that Harris was hospitalized for ten to twelve days.

Kelly Fite, a retired firearms examiner formerly of the Georgia Bureau of Investigation, examined both weapons used in the shooting and Tory Hardy’s clothing. After test-firing both weapons, Fite developed the opinion that the holes in Hardy’s clothing were consistent with those made by flat point bullets of the type found in the .357 magnum after the shooting. The holes in Hardy’s clothes were not consistent with those made by the type of bullets found in the .38 revolver. On cross-examination, Fite acknowledged that the Tennessee Bureau of Investigation had conducted similar testing and had been unable to reach the conclusions he reached.

Defense Proof

Antonio Davenport testified that he attended the Strut and left with Donell Woods and Douglas Holmes. He recalled the incident between Webb and the defendant and said that after the defendant extended his middle finger, a crowd ran up to his car. Davenport did not approach the car but observed the ongoing events. He saw the crowd back away after the defendant pulled a gun. He saw Beasley run to Holmes, grab a gun, and fire it. He testified that Beasley fired the first shot and

that he and Harris were in Beasley's line of fire before they ran off. He recalled seeing the defendant shoot, after he had been fired upon three times.

Because he was unavailable at the time of trial, Gregory James Hyder's two statements to the police were read into evidence by counsel for the State and the defense. In his first statement, Hyder's recollection regarding the incident with Webb and the defendant, and the defendant's brandishment of his weapon, was consistent with that of previous witnesses. According to Hyder, after the defendant displayed his weapon, he told the crowd, "Y'all ain't going to do nothing, y'all back up on the sidewalk." He said the defendant then said, "F y'all," and fired the first shots into the crowd. He said he did not see anyone firing at the defendant's vehicle.

Hyder's second statement is materially inconsistent with his first. In his second statement he said that there was a person in the crowd shooting at the defendant's car and that this person fired the first shot. He reiterated that he did not know the identity of the shooter from the crowd.

Virgil Ashley testified that he attended the Strut with Douglas Holmes and Antonio Davenport and was present when the two groups of men threatened to fight. He saw the defendant's car nearly hit Webb, after which a crowd surrounded the defendant's car. He said that when the defendant later stopped in traffic, a crowd of approximately twenty people walked up to the defendant's car and one person approached the driver's side. Ashley testified that the crowd and the defendant exchanged words, the defendant raised his gun, the crowd backed away, someone from the crowd began firing at the car, and the defendant fired back. He said the defendant's car was sandwiched between cars in front of and behind him. He did not see which member of the crowd had the gun.

Kenneth Lamar Alexander was unavailable to testify at trial, so his preliminary hearing testimony was read into evidence. Alexander attended the Strut and witnessed the altercation involving Webb and the defendant. When the defendant's car subsequently stopped in traffic, Alexander said that the crowd acted like they wanted to take his car. He said that a member of the crowd reached into the car to try to hit the defendant. Alexander testified that once the defendant displayed his gun, a man in the crowd said, "Give me the gun" and started shooting into the car. Alexander then began running and saw the defendant duck down in his seat and return fire. Alexander did not see who gave the gun to the shooter in the crowd.

The defendant's father, Rheubin Taylor, Sr., testified that he owned the gun the defendant used in the shooting. Taylor said he normally keeps the gun in his truck but put the gun in the defendant's car on the morning of the Strut because he and the defendant were swapping vehicles for the day. He said he forgot to take the gun out of the car when he returned it to his son and did not inform him that the gun was in the car. Taylor said that when the defendant arrived home after the Strut, he noticed that the defendant's car had five bullet holes in it. He said he removed the .357 pistol from the defendant's car and observed that it had been fired five times. He summoned the police to his house and turned the gun over to the officers.

Calista Ware, the defendant's fiancée, testified that she was riding in the front passenger's seat of the defendant's car on the night of the Strut and that the defendant's sister was also in the car. As the defendant drove down 10th Street, Ware noticed two groups of people, one wearing red and one wearing blue, who appeared to be preparing to fight. After the police broke up the confrontation, Ware said one of the men came out into the middle of the road and remained there, talking to some men on the sidewalk. She said the defendant came to a complete stop and tapped his horn at the man, after which the crowd began screaming at them and calling her and the defendant's sister derogatory names. She said the defendant never responded verbally to the crowd but acknowledged that he extended his middle finger as he drove off.

Ware said that the defendant drove for about a half a block before he was stopped by heavy traffic. Ware saw him reach down under the seat, retrieve the gun, and place it on the seat. She said over twenty men then ran toward the car, getting so close that she could not see anything other than the men. She saw one man reach in through the defendant's window toward the door lock. She heard the men tell the defendant, "Get you[r] A out of the car, you're trying to show out for some B's." Ware was frightened and believed that the occupants of the car were either going to be killed or seriously hurt. She said the defendant then displayed the gun, without pointing it at the crowd, and the crowd backed away onto the sidewalk. She heard the defendant's sister warn the defendant that someone in the crowd had a gun. As Ware tried to turn and see who had the gun, she heard gunshots and jumped down to the floorboard. After the shooting ended, she felt a jolt and noticed that the defendant was attempting to leave the area. The three returned to the defendant's house and summoned his father, who called the police.

Keturah McIver, the defendant's sister, testified that she accompanied him and Ware to the Strut, seated in the rear driver's side seat. Her testimony regarding the incident between Webb and the defendant was consistent with Ware's. When traffic forced the defendant to stop his car, McIver saw around twenty people run up to their car. She testified that the crowd was right outside her window and that one of them reached inside the driver's window to attempt to unlock the door. She was afraid for the safety of herself, the defendant, and Ware. She heard the crowd say, "We're going to kick [the defendant's] ass. We're going to take his car." She recalled that the defendant brandished his gun and the crowd backed away to the sidewalk. McIver then saw a man in a blue shirt lift up his shirt and hand a gun to a man wearing a black outfit. The man in the black outfit began walking swiftly toward the car and fired the gun. She warned the defendant about the gun and saw the first shot from the man in black go past the defendant's head and into the windshield. She began screaming and ducked down in the backseat. After the shooting, she felt the car jostle and realized that they were headed home.

The defendant testified that he did not consume any alcohol on the day of the Strut. While driving down 10th Street with his fiancée and sister, he observed the police disperse the two groups of men in red and blue who were preparing to fight. He said that as he drove down 10th Street one of the men in blue refused to move from the street, so he came to a complete stop and tapped his horn. Afterwards, the crowd began yelling and cursing at him and gesturing at him with their fingers. The defendant extended his middle finger in return, then advanced about a block before

traffic compelled him to stop. After he stopped, he shifted his feet and felt his father's gun on the floorboard. The defendant saw at least twenty individuals approach his car, one of whom reached in to attempt to unlock his door. He heard members of the crowd say, "What was all that shit? Get your ass out the car. You trying to show out with two bitches." The defendant felt threatened, raised his gun, and told the crowd to back away. He denied threatening to shoot anyone. After the crowd retreated, he heard someone in the crowd say, "Man, bust that nigger," and heard his sister scream, "Taylor, he's got a gun." He looked through his sister's window and heard the first gunshot hit the windshield. He saw Beasley moving toward him and continuing to fire. He looked down to check on Ware and then returned fire at Beasley. The defendant said he shot twice and was looking at Beasley when he fired. He testified that Beasley was about five feet from his car. After he fired the first two shots, he could no longer see Beasley and fired three shots up in the air to cause the rest of the crowd to disperse. He then looked around the street, and seeing it empty, drove out of the area, striking two cars on his way out. The defendant said he did not remain and wait for the police because he feared the shooter and the crowd might return. He testified that he could not have hit anyone in the crowd when he fired the three shots into the air and that he did not know anyone had been hit when he left the scene. On cross-examination, the defendant testified that he could not leave the area when confronted by the crowd because his vehicle was surrounded by cars in front of him and crowd members behind him.

After deliberation, the jury found the defendant guilty of voluntary manslaughter in the death of Tory Hardy, felony reckless endangerment, attempted voluntary manslaughter in the injury of Ronald Harris, and reckless aggravated assault in the injury of Harris. The trial court merged the attempted voluntary manslaughter and reckless aggravated assault convictions.

At the sentencing hearing, Terilyne Nicholson, Tory Hardy's mother, read into evidence a victim impact statement prepared by herself and Hardy's extended family. She described the devastating effect of Hardy's death on herself and her family and implied that the defendant received preferential treatment from the authorities because of his father's influence. On cross-examination, she testified that she also believed Timothy Beasley's actions were wrong, but she did not harbor the same feelings of animosity toward him because she believed the defendant was the one who killed her son. She acknowledged that, at the time of his death, Hardy was awaiting trial for an aggravated robbery charge. She was unaware that her son carried a gun and testified that he was not carrying a gun on the night of the shooting.

The defendant testified on his own behalf that he had never previously been arrested, charged in juvenile court, or disciplined for behavioral problems at school and that his father had never previously helped get him out of trouble. He said that when the crowd approached his car he feared for his life and the lives of his fiancée and sister. He said that he fired his gun at the person who was shooting at him. He said he believed that if he had not returned fire, he would have been killed and his sister and fiancée would have been raped or killed as well. He testified that his father, an attorney, advised him that he had a right not to speak with the police but instructed him to cooperate with them. In the defendant's opinion, if he had waited one more second, he would not have had an opportunity to return fire. He testified that he felt remorse but had not shown that emotion toward

Hardy's family because he believed they were very angry with him and would not allow him to approach them. He said he felt very badly that Hardy lost his life but did not know whether a bullet from his gun hit either Hardy or Harris.

The defendant testified that he had not returned to college as a result of the case against him and was currently working odd jobs. He said he had worked for three employers since the shooting. He acknowledged that he has a son, whom he has not legitimated, with Ware but said that he has an informal arrangement to support him and keeps him at least three days per week. He further acknowledged that he had consumed alcoholic beverages before his twenty-first birthday and had "occasionally" smoked marijuana from the time he was seventeen, including once after being convicted. Asked if he accepted responsibility for his actions, the defendant said, "I never blamed [the shooting] on anybody else. I accept my responsibility for defending my life and my sister's life and my fiancée's life, yes, sir." He refused to acknowledge that he killed Hardy or shot Harris, saying that he had not "seen any evidence that really shows I done it. Myself, I know that I was shooting towards the shooter."

Rheubin Taylor, Sr. testified that he had never gotten the defendant out of any criminal charges or behavioral problems at school and had not attempted to prevent his son from being investigated or charged in the shooting. He said that the defendant's son spent nights in his house and that the defendant's relationship with Ware was stronger currently than it had ever been previously. He said that the defendant has a quiet personality and passive disposition and has become withdrawn and solemn since the shooting. On cross-examination, Taylor acknowledged the defendant's marijuana use. He testified that the defendant had not legitimated his child but did pay informal child support. Asked if his son did anything wrong the night of the shooting, Taylor responded, "As far as defending himself, I say no, sir."

Gerald Mason, Sr., a friend of the defendant's family, testified that the defendant attended his daycare center beginning when he was eighteen months old. He said that the defendant had been in his home several times and is an outstanding leader with a warm, sincere, affectionate personality. On cross-examination, Mason testified that he was aware that Hardy and his brother also had attended his daycare center.

Wendell Morgan testified that the defendant had attended high school and played sports with his son. He had hosted the defendant in his house several times and considered him "a great kid to be around. Very mannerable." He considered the defendant a very serious young man and a role model for his own son.

Sam Scott testified that he ran a tennis program at a local park where he instructed the defendant. He said that he never had any problems with the defendant and never saw him exhibit disrespect or behavioral problems.

Glen Chambers, the defendant's godfather, testified that the defendant has a very caring, spiritual personality and was a likable child. He testified that the defendant has been very remorseful about being involved in the shooting and has become more subdued.

Finding that the defendant was a Range I, standard offender, the trial court sentenced him to four years for voluntary manslaughter, one year for felony reckless endangerment, and two years for attempted voluntary manslaughter, to be served concurrently. The court, applying the statutory presumption that the defendant was a favorable candidate for alternative sentencing, see Tennessee Code Annotated section 40-35-102(6) (2006), suspended the defendant's sentence and placed him on supervised probation with the condition that one year be served on house arrest.

The defendant timely filed a motion for new trial. At the hearing, the trial court denied the motion but granted judicial diversion, saying:

I am, however, going to make it a [Tennessee Code Annotated section] 40-35-313 plea. That doesn't really do anything but give this young man a chance to . . . successfully complete . . . the program, and if he does that, then he gets . . . an opportunity from that, and it appears to me that this is a case that that fits for, so I'm going to do that.

ANALYSIS

I. State's Issue Regarding Judicial Diversion

The State argues that the trial court erred by granting judicial diversion, saying that the defendant was not a suitable candidate for diversion and that the ends of justice and the best interests of the public strongly favor denial of diversion.

Tennessee Code Annotated section 40-35-313 provides that, following a determination of guilt by plea or by trial, a trial court may, in its discretion, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A). A qualified defendant is one who pleads guilty or is found guilty of a misdemeanor or Class C, D, or E felony; has not been previously convicted of a felony or a Class A misdemeanor; and is not seeking deferral for a sexual offense or a Class A or B felony. Id. § 40-35-313(a)(1)(B). If the defendant successfully completes the period of probation, the trial court is required to dismiss the proceedings against him, and the defendant may have the records of the proceedings expunged. Id. § 40-35-313(a)(2), (b). The decision to grant or deny a qualified defendant judicial diversion lies within the sound discretion of the trial court. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997); State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). As such, it will not be disturbed on appeal absent an abuse of discretion. State v. Turco, 108 S.W.3d 244, 246 n.5 (Tenn. 2003). To constitute an abuse of discretion, the record must be devoid of any substantial evidence in support

of the trial court's decision. Cutshaw, 967 S.W.2d at 344; Bonestel, 871 S.W.2d at 168; State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

In determining whether to grant diversion, the trial court considers (a) the accused's amenability to correction, (b) the circumstances of the offense, (c) the accused's criminal record, (d) the accused's social history, (e) the accused's physical and mental health, (f) the deterrence value to the accused as well as others, and (g) whether judicial diversion will serve the interests of the public as well as the accused. Electroplating, 990 S.W.2d at 229; Bonestel, 871 S.W.2d at 168. A trial court should not deny judicial diversion without explaining the factors in support of its denial, and how those factors outweigh other factors in favor of diversion. Id.

As we have set out, the trial court granted judicial diversion to the defendant, reasoning that the action did not "really do anything but give [the defendant] a chance to . . . successfully complete . . . the program, and if he does that, then he gets . . . an opportunity from that, and it appears to me that this is a case that that fits for, so I'm going to do that." From this explanation, it is unclear what factors the court considered in determining that the granting of judicial diversion was appropriate. The trial court did give a lengthy explanation as to why the defendant was being denied full probation. However, this explanation did not demonstrate that the court had considered the factors to be weighed in deciding whether judicial diversion should be granted. Given the complicated nature of this matter, the lengthy record, and the brief statement of the trial court in granting judicial diversion, we are unable to determine whether the court abused its discretion in this action. Accordingly, we reverse the grant of judicial diversion and remand for the trial court to consider the relevant factors and determine whether judicial diversion is appropriate. See State v. Lewis, 978 S.W.2d 558, 567 (Tenn. Crim. App. 1997) ("Because the trial court failed to consider all of the factors appropriate to the grant or denial of judicial diversion, and because its statement of the reasons for denial is vague and conclusory, we find the record inadequate to allow appropriate appellate review.").

Two additional matters remain. The State appealed the trial court's grant of probation to the defendant, arguing that this court should consider the defendant's underlying sentence if the grant of judicial diversion is reversed. Additionally, the defendant argues that, if the grant of judicial diversion is reversed, he wishes to appeal the trial court's determination that, in setting the sentence, the enhancement factor was applicable that the offense involved more than one victim. To this claim, the State responds that the defendant does not have a right to appeal because no judgment of conviction has been entered in this matter. However, we conclude that, given our remand of this matter for findings as to the granting of judicial diversion, resolution of these claims is not appropriate. The State's appeal is conditioned, as we understand, upon our determining that the trial court abused its discretion in granting judicial diversion. Our remand is for the trial court to make the required findings as to judicial diversion, so that we can determine whether the court abused its discretion in doing so. As to the defendant's appeal, we are not directing the trial court to enter a judgment which, as we understand, would trigger what the defendant claims as a right to appeal. Accordingly, we conclude that neither of the additional issues on appeal is appropriate for consideration at this time.

CONCLUSION

Based upon the foregoing authorities and reasoning, the order of the trial court granting judicial diversion is reversed and the case is remanded to the trial court for resentencing.

ALAN E. GLENN, JUDGE